83-824

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PATMON, YOUNG AND KIRK
PROFESSIONAL CORPORATION
and FREDERICK PATMON . . . . . Petitioners,

v.

UNITED STATES OF AMERICA
and BONNIE BURKS, Revenue
Agent of the Internal Revenue
Service . . . . . Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

Patmon, Young & Kirk
Professional Corporation
Frederick A. Patmon
In propria persona
3770 Penobscot Building
Detroit, Michigan 48226
(313) 965-2675

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT'S ORDERS IMPOSING COERCIVE SANCTIONS AGAINST RESPONDENT PYK AND COMPELLING DISCOVERY AGAINST RESPONDENT PYK AND NON-PARTY PATMON IN AID OF EXECUTION ARE APPEALABLE?

PARTIES

(All Named in Caption)

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Agent of the Internal
Revenue Service, ... Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioners, Patmon, Young & Kirk Professional Corporation and Frederick A. Patmon, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A , infra, 1a - 4a) is not reported. The orders of the district court (App. B, C and D , infra, 5a - 17a) are not reported.

JURISDICTION

The petition for rehearing was denied on September 15, 1983 (App. E , infra, 18a). An order staying mandate was filed on September 29, 1983, extending the time within which to file a petition for a writ of certiorari to October 29, 1983 (App. F , infra, 20a - 21a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1), 2101(c), and Rule 20 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be *** compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.***"

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 7402(a) provides:

> The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs, and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

26 U.S.C. § 7604(a) provides:

> Jurisdiction of district court. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

28 U.S.C. § 636 (b)(1)(A); (c), (3), (4) provides:

(b) (1) Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

* * *

(c) Notwithstanding any provision of law to the contrary:

* * *

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

28 U.S.C. § 1291 provides:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

The cases before this Court arise out of the related cases (to be the subject of a separate Petition for Certiorari) (App. G , infra, 22a) which present subsidiary questions paralleling the questions presented in case Nos. 81-1189/ 1251/1318/1549/1804 and 82-1005/06/1217. (App. A , infra, 1a - 4a).

The related cases

The related cases (consolidated and expedited [28 U.S.C. § 1826(b)] involve appeals of post-judgment orders issued in Civil Actions 80-74869 and 80-74872 by the District Court of the Eastern District of Michigan on November 30 and December 7, 1981, which imposed sanctions for civil contempt against Patmon, Young & Kirk Professional Corporation ("PYK") and Hallison H. Young ("Mr. Young").

The Cases Below

These cases arise out of three (3) contempt and purge proceedings involving Hallison H. Young, individually, Hallison H. Young as a responsible officer of the law firm of Patmon, Young & Kirk Professional Corporation (PYK), which are partially reported at United States v. Young, 532 F.Supp. 334 (E.D. Mich. S.D. 1981).

On December 9, 1981 and December 23, 1981, PYK filed with the District Court and submitted to the Court of Appeals a surety Supersedeas Bond in the amount of $12,000.00. (App. 43, 44.)1/

On February 8, 1982, the government served a notice for the taking of the deposition of PYK in aid of execution

1/ "App." refers to Appellants' Appendix in these cases.

proceedings on the $8,000.00 fine assessed against PYK and scheduled it for February 19, 1982.

On February 18, 1982, PYK filed a motion for an order staying discovery in aid of execution of judgment until final disposition of cases then pending before the Sixth Circuit as Case Nos. 81-1189/90, 81-1251/1318/1549/1804, 82-1005/1006/1217. (App. 10, 66.)

On March 23, 1982, the government served a second notice to take the deposition of PYK on April 16, 1982, by and through "its responsible officer, director, managing agent or other designated person" pursuant to Rule 30(b) Fed.R.Civ.P. (App. 10, 50.)

The District Court issued, on March 15, 1982, an Order Denying Motion to Stay Discovery in Aid of Execution in the case below "without prujudice, subject to

renewal at a later date should Respondent [PYK] demonstrate that Petition seeks additional and burdensome discovery". (App. 67 - 68.)

On April 15, 1982, PYK's counsel, Ulysses W. Boykin, contacted the government through Mark Werder's secretary and requested an adjournment of the deposition scheduled for April 20, 1982, to which Mr. Werder's secretary consented and informed Mr. Boykin that Mr. Werder would contact him upon his return for rescheduling the deposition. At no time thereafter did the government reschedule the notice of taking the deposition of PYK. (App. 101 - 102.)

On May 27, 1982, the government filed a Petition for Order to Show Cause why PYK should not be held in contempt alleging, inter alia, that PYK had failed to pay "the interim coercive sanction of $8,000.00" and sought an "appropriate disciplinary

referral pursuant to Appendix A of the local rules for the Eastern District of Michigan." (App. 16 - 18.)

The district court, on August 13, 1982, issued an order to show cause why PYK should not be held in contempt, and ruled that the government's request for disciplinary referral "is DENIED". (App. H infra, 25a).

PYK filed its Response on August 18, 1982, denying the allegations of the government's motion for contempt and, taking exception to the preliminary findings set forth in the District Court's Order to Show Cause and informing the Court that PYK had not failed to appear on two occasions for debtor's examination and that PYK timely and properly sought a motion for a protective order (Motion to Stay Discovery). PYK asserted, inter alia, that the district

court was without authority or jurisdiction to issue the Order to Show Cause under the circumstances and that the district court was without power or authority to permit post-judgment proceedings in aid of execution because the "interim coercive fine of $8,000.00" was not a judgment within the ambit of Rule 69(a) Fed.R.Civ.P. and M.C.L.A. §600.4011.(1). (App. 54 - 77.)

On April 20, 1983 at 10:55 a.m., the Honorable John Feikens, chief judge of the United States District Court, issued an Administrative Order which recited that the Honorable Patricia J. Boyle, the district judge previously assigned to Civil Action No. 80-74872 (U.S.D.C. E.D. Mich. [Sixth Circuit case NO. 81-1804]) had resigned from the bench and that:

> "all motions filed and pending on the civil docket of former Judge Patricia J. Boyle are referred to Magistrate

Thomas A. Carlson for disposition and/or report and recommendation in accordance with 28 U.S.C. § 636 and Local Rule C-1." (App. I infra, 27a).

On April 20, 1983, at 1:41 p.m. after the filing of Judge Feikens' order reciting that Judge Boyle had resigned from the bench, Judge Boyle issued an "Order Directing Respondent to . . . Appear at Debtor's Examination and Order of Reference", which ordered that PYK "within seventy-two (72) hours appear before Magistrate Thomas A. Carlson for the taking of deposition through one or more persons designated pursuant to Fed.R.Civ.P. 30(b)(6), concerning all matters relevant to the identity and location of the assets of respondent". (Emphasis supplied.) The order further recited that the matter was "referred to the magistrate for report and recommendation". (App. B , infra, 5a). The order was received by PYK on April 21, 1983 (a Thursday).

In compliance with Judge Boyle's order of April 20, 1983, on April 21, 1983, PYK served and filed a notice of designation of Raymond Wainwright. (App. 92.)

Pursuant to Judge Boyle's order and said designation, on Friday, April 22, 1983, PYK, through Raymond Wainwright, appeared before Magistrate Carlson, was available and did proffer to give full disclosure as directed concerning all matters relevant to the identity and location of assets of Respondent. However, at about 4:12 p.m. on April 22, 1983, the government procured an ex parte order extending the time for the debtor's examination to May 4, 1983 at 10:00 a.m. (App. 23, 92, 150.)

On April 22, and 29, 1983, the government served PYK with another notice to take its deposition (through its responsible officer, director, managing agent or other designated person on May 4, 1983, at 10:00 a.m. and a deposition subpoena duces tecum, respectively. In response, on May 4, 1983, before 10:00 a.m., PYK filed a Combined Motion to Quash Deposition Subpoena Duces Tecum and Objections and Motion for Protective Order. (App. 93, 95, 111,)

Mr. Leonard Green, Chief Deputy Clerk of the Sixth Circuit Court, sent a letter to counsel of record dated May 4, 1983 in case Nos. 81-1804, 82-1005, 82-1006 and 82-1217 informing Appellants that the panel of judges which heard argument in these cases in 1982 directed counsel to file supplemental briefs no later than June 6, 1983 "addressed to the effect of those

cases of the United States Supreme Court's April 19, 1983 decision in the case of United States et al. vs. Rylander et al., 51 U.S.L.W. 4367." (App. 192.)

On May 4, 1983 at 10:00 a.m. PYK, through Raymond Wainwright, appeared before Magistrate Carlson and fully, completely and unevasively answered all questions put to him concerning all matters relevant to the identity and location of the assets of PYK. (App. 150, 253.)

During the proceedings on May 4, 1983, the government contended that Mr. Wainwright did not have sufficient knowledge to give the testimony required by Judge Boyle's order of April 20, 1983 and proposed to have Mr. Patmon appear in the stead of Mr. Wainwright. At the request of the government, the magistrate stated that he would order Mr. Patmon "As one of the members, I assume of the P.C." to "appear

in a continuation of these particular proceedings." (App. 307.)

Since Mr. Wainwright testified on May 4, 1983 that Ken Doshi would have knowledge of the matters which he did not have, on May 5, 1983, PYK served and filed a Second Notice of Designation pursuant to Judge Boyle's order of April 20, 1983, designating Ken Doshi to testify. (App. 161, 296.)

On May 5, 1983, after summarily denying PYK's Motion to Quash Deposition Subpoena Duces Tecum and Motion for Protective Order, the magistrate issued an order that Mr. Patmon appear to testify as to the identity and location of PYK's assets and bring with him all documents "which, the respondent firm or any employee or agent thereof presently possesses, or has a right to possess," and therein quashed PYK's Second Notice of Designation of Mr. Doshi, erroneously reciting that Mr.

Doshi had "already testified". (App. C infra, 11a .)

At 1:08 p.m. on May 9, 1983, PYK served and filed a Rule 30(d) demand to suspend the "debtor's examination". (App. 116.)

On May 9, 1983, Magistrate Carlson issued a second order rescheduling the time for appearance by Mr. Patmon until May 13, 1983 at 2:00 p.m. (App. D , infra, 15a).

On May 9, 1983, PYK and Mr. Patmon filed a Motion (A) to Terminate or Limit Debtor's Examination; (B) for a Protective Order; (C) for a Stay of Discovery Pending Determination of Motions for Relief From Judgments and Orders and Respondent's Appeal and Review of Magistrate's Order; (D) for Relief From Orders of Magistrate Carlson; and (D) to Vacate Judges Boyle's and Feikens' Orders of Reference, a Motion to Quash, Strike and Vacate Magistrate's

Order of May 5, 1983, and a Notice of Appeal to the Sixth Circuit from Judge Boyle's order of April 20, 1983 and the magistrate's order of May 5, 1983. (App. 97, 106, 111, 123, 136.)

On May 13, 1983, PYK and Mr. Patmon sought a hearing before the Honorable John Feikens on Respondent's Motions to Terminate or Limit Debtor's Examination... for Stay of Discovery. However, Judge Feikens declined to hear any of the motions on the merits. (App. 382.)

On May 13, 1983 at 2:00 p.m., PYK and Mr. Patmon submitted the Supplemental Response and asserted their defenses or explanations thereto, inter alia, that the bulk of the documents commanded by the order and deposition subpoena never existed or to the extent they did exist, were not within their possession since they had been

delivered to the government; that PYK stood willing and ready to give testimony through its designees, Wainwright and Doshi, in compliance with Judge Boyle's order of April 20, 1983; that PYK, through Hallison H. Young and witnesses Wainwright and Doshi, had already given cross-examined testimony in the action below concerning the identity and location of PYK's assets; that it was impossible to comply with the magistrate's orders of May 5 and 9, 1983, because to do so, would constitute a violation of Judge Boyle's order of April 20, 1983; that Mr. Patmon had never been served with a notice to take his deposition, a subpoena duces tecum or a summons and complaint in the action and had never been designated or consented to testify in the action pursuant to Judge Boyle's order of April 20, 1983 or Rule 30(b)(6) Fed.R.Civ.P. (App. 218, 392.)

The magistrate issued his Report and Recommendation on May 13, 1983, and PYK filed and served its Notice of de novo Review and Appeal From Magistrate's Report and Recommendation on May 20, 1983. (App. 218.)

By letter dated May 25, 1983, Leonard Green, Chief Deputy Clerk of the Circuit Court, wrote a letter to counsel of record which stated, in pertinent part, that:

> "We have recently received notices of appeal from two more district court rulings in district court case No. 80-74872, United States of America, et al. vs. Patmon, Young and Kirk, et al. Those appeals, filed by Patmon, Young and Kirk and Frederick A. Patmon, have been docketed in this court as Nos. 83-1337 and 83-1338, respectively.
>
> I have been asked by the court to advise you that all of these cases will be heard in Cincinnati on June 21, 1983. . . :

* * *

> Cases Nos. 83-1337 and 83-1338, and any other new appeals which might be filed from recent district court or magistrate actions in these matters, will be argued on the basis of either the supplemental brief referred to above or an additional short brief, and any appendix necessary for the court's consideration." (App. G, J, K, infra, 22a - 30a .)

The hearing panel summarily dismissed both of the appeals, as "nonappealable". (App. A ,infra, 1a - 4a .) The Court's opinion is stated in conclusory terms, grossly misstates the facts, overlooks the substantial and first impression issues and erred on all questions of law.

Jurisdiction of the District Court and Court of Appeals.

Subject matter jurisdiction in these cases over Petitioner PYK was conferred upon the United States District Court for the Eastern District of Michigan by 26 U.S.C. §§ 7402(b) and 7604(a).

Jurisdiction in these cases over Petitioners' appeals to the United States Court of Appeals for the Sixth Circuit from the District Court's and magistrate's orders was conferred by 28 U.S.C. § 1291.

The Sixth Circuit Court also had pendent and retained jurisdiction of Petitioners' appeals from the district court's and magistrate's orders. (See related cases, App. A, G, infra, 1a - 22a.)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT THAT THE DISTRICT COURT'S AND THE MAGISTRATE'S ORDERS IMPOSING COERCIVE SANCTIONS AGAINST RESPONDENT PYK AND COMPELLING DISCOVERY AGAINST PYK AND NON-PARTY PATMON IN AID OF EXECUTION WERE NON-APPEALABLE IS IN CONFLICT WITH OTHER APPELLATE DECISIONS

The Sixth Circuit had
Jurisdiction of the Appeals

On May 9, 1983, PYK filed its notice of appeal to the Sixth Circuit from the district court's order of April 20, 1983 and the magistrate's order of May 5, 1983 and Mr. Patmon filed his appeal to the Sixth Circuit on May 9, 1983 from the magistrate's order of May 5, 1983.

The district court's and magistrate's orders were issued in connection with the district court's order to show cause issued August 13, 1982, pursuant to and in connection with a sanction ordered by the court

on November 30, 1981 and December 7, 1981, imposing an $8,000 fine against PYK.

The appealability of the district court's orders of November 30, December 7, 9 and 14, 1981 and the Court of Appeals' pendent and retained jurisdiction cannot be seriously contested. See 28 U.S.C. § 1291; 16 Wright, Miller, Cooper and Gressman, Federal Practice and Procedure: Jurisdiction § 3937, generally; Reisman v. Caplin, 375 U.S. 440 (1964); United States v. Rylander, 656 F.2d 1313 (9th Cir. 1981); United States v. Hankins, 581 F.2d 431, 438 n. 10 (5th Cir. 1978) cert. denied, 440 U.S. 909.

Since PYK was a party to the pending appeals in case Nos. 81-1189/90/1251/ 1318/1549/1804, 82-1005/06/ 1217, the Court of Appeals had pendent jurisdiction to review the district court's subsequent

order of April 20, 1983, denying, in part, the government's motion to hold PYK in contempt, imposing coercive sanctions against PYK and compelling discovery in aid of execution. See, Penfield Co. of California v. Securities & Exchange Commission, 330 U.S. 585, 591 (1947), rehearing denied, 331 U.S. 865; Union Tool Co. v. Wilson, 259 U.S. 107, 112 (1922); Halderman v. Pennhurst State School & Hospital, 673 F.2d 628, 636 (3rd Cir. 1982); Davis v. Board of School Comm'rs of Mobile County, 517 F.2d 1044, 1050 (5th Cir. 1975); Gilbert v. Johnson, 490 F.2d 827 (5th Cir. 1974); Blaylock v. Checker Oil Co, 547 F.2d 962, 965 - 966 (6th Cir. 1976).

The deposition subpoena at issue in the cases below was not addressed to Mr. Patmon and the magistrate's orders (issued while acting as an "adjunct judge", not

being subject to an order of reference, review by an Article III judge or supervision of an Article III judge) disposed of Mr. Patmon's claims fully and finally. Cf. Perlman v. United States, 247 U.S. 7 (1918); Catlin v. United States, 324 U.S. 229, 233 (1945); Gravel v. United States, 408 U.S. 606, 608 n. 1 (1972); United States v. Ryan, 402 U.S. 530, 533 (1971); United States v. Nixon, 418 U.S. 683, 691 (1974).

Discovery orders may be appealable when a privilege and non-party is involved. Cates v. LTV Aerospace Corporation, 480 F.2d 620, 622 (5th Cir. 1973). In re International Systems & Controls Corp., Etc., 693 F.2d 1235, 1238 n. 1 (5th Cir. 1982); Velsicol Chemical Corp. v. Parsons, 561 F.2d 671, 674 (7th Cir. 1977), cert. denied, 435 U.S. 942, 98 S.Ct. 1521, 55 L.Ed.ed 538 (1978); Re Grand Jury, see Branch v. Phillips Petroleum Co., 638 F.2d

873, 878 (5th Cir. 1981); In re Grand Jury Proceedings in Matter of Fine, 641 F.2d 199 (5th Cir. 1981) Accord: In re Irving, 600 F.2d 1027, 1032 (2nd Cir. 1979), cert denied, 444 U.S. 866; In re Subpoena Addressed to: Samuel W. Murphy, Jr., 560 F.2d 326, 332 n. 10 (8th Cir. 1977). In re International Systems & Controls Corp., Etc., 693 F.2d 1235, 1238 n. 1 (5th Cir. 1982); Re Grand Jury, 619 F.2d 1022 (3rd Cir. 1980).

The decision of the Sixth Circuit as to the appealability of the district court order permitting, pursuant to Fed.R.Civ.P. 69, post-judgment discovery in aid of execution of a judgment is in conflict with the Court of Appeals for the Fifth Circuit on the same matter in First Federal Savings & Loan Association v. Fisher, 544 F.2d 902 n. 2 (5th Cir. 1977). But see, Childs v. Kaplan, 467 F.2d 628 (8th Cir. 1972); U. S. v. Fabric Garment Co., 383 F.2d 984 (2nd

Cir. 1967); Rouse Const. Intern., Inc. v. Rouse Const. Corp., 680 F.2d 743, 745 (11th Cir. 1982). Compare: U. S. v. McWhirter, 376 F.2d 102 (5th Cir. 1967); Fehlhaker v. Fehlhaker, 664 F.2d 260, 262 (11th Cir. 1981) (denial of a motion to compel discovery under Rule 69(a) is appealable).

The decision of the Sixth Circuit as to Petitioners' claim that the court had pendent and retained jurisdiction is in conflict with the Court of Appeals for the Fourth Circuit on the same matter in Consolidation Coal Co b. Local 1702, UMW, 683 F.2d 827, 830 - 831 (4th Cir. 1982); and the Court of Appeals for the Second Circuit on the same matter in Sanders v. Levy, 558 F.2d 636, 642 - 643 (2nd Cir. 1976), reversed on other grounds, 437 U.S. 340 (1978). There is sufficient overlap in the issues involved in the related cases and these cases to warrant the Sixth Circuit's exercise of its pendent and plenary authority over these appeals. Id.

The decision of the Sixth Circuit as to Petitioners' claim of appealability of the district court orders under the judicially created exception to the finality doctrine is in conflict with this court on the same matter in United States v. Ryan, supra; Perlman v. United States, supra; United States v. Nixon, supra; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Nixon v. Fitzgerald, 50 U.S.L.W. 4797, 4800 at n. 23 (1982). Since Petitioners' appeal of the district court orders presents serious and unsettled questions, these cases were properly in the Sixth Circuit and are properly within this Court's certiorari jurisdiction. See 28 U.S.C. § 1254.

THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT

There is nothing in the Sixth Circuit's opinion which indicates the facts on which it based its clearly erroneous conclusions. Thus, an intelligent review of the court of appeals' ultimate decision is impossible.

The failure of the Sixth Circuit to make specific findings of fact and conclusions of law, constitutes a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. See United States v. Claycraft Co., 408 F.2d 366 (6th Cir. 1969); Group Ass'n Plans, Inc. v. Colquhorn, 466 F.2d 469 471-72 (D.C. Cir. 1972).

The district court's orders of April 20 and May 5 and 9, 1983 are unlawful and void as to Mr. Patmon because the district court lacked subject matter and personal jurisdiction over Mr. Patmon.

Mr. Patmon is not a party to the action below. He was not served with a notice to take his deposition or deposition subpoena in connection with the post-sanction "debtor's examination" proceedings of April 20, May 5 and 9, 1983.

According to Judge Boyle's order of April 20, 1983, in the absence of PYK's designation of Mr. Patmon pursuant to Rule 30(b)(6) Fed.R.Civ.P. (which never occured), the government was precluded from taking Mr. Patmon's deposition in connection with the "debtor's examination".

Considering Judge Boyle's Order Denying Motion to Stay Discovery in Aid of

Execution (which recited that the government "seeks only a single deposition") and her subsequent order of April 20, 1983, it is clear that she intended that the debtor's examination not be extended or enlarged. However, the Government attempted to enlarge the debtor's examination by serving PYK on April 22 and 29, 1983 with another notice to take the deposition of PYK, a request to produce documents, and a subpoena duces tecum.

Under these circumstances, the district court and the magistrate were without subject matter jurisdiction or personal jurisdiction over Mr. Patmon in connection with the debtor's examination. Therefore, the district court's orders of April 20, May 5 and 9, 1983 are void and a nullity as to Mr. Patmon. See Application of Johnson & Johnson, 59 F.R.D. 174 D. Del. 1973); Lincoln Laboratories, Inc. v.

Salvage Laboratories, Inc., 27 F.R.D. 476 (D. Del. 1961); Ghandi v. Police Dept. of City of Detroit, 74 F.R.D. 118, 120 (E.D. Mich. S.D. 1977); El Salto, S.A. v. PGS Co., 444 F.2d 477, 484 (9th Cir. 1971) ("While Rule 69(a) permits a judgment creditor to examine 'any person,' mere notice to attend is insufficient to compel the attendance of a person not a party; a subpoena is required. . . The notice sent to Greenburg [sole corporate officer] was not proper notice to an officer through whom the deposition of a corporation is sought, since it did not purport to seek Greenburg's deposition in his capacity of officer or managing agent of PSG"); U. S. Const. Am. V.

The validity of the district court's orders depended upon that court having jurisdiction over both the subject matter

and the parties. Toll v. Gottlieb, 305 U. S. 165, 171 - 172 (1938); Thompson v. Whitman, 18 Wall 457, 465 (1873). Since the district court did not have personal jurisdiction over Mr. Patmon, its orders of April 20, May 5 and 9, 1983 were void as to Mr. Patmon. See U.S. Const. Am. V.

Assuming arguendo the district court had subject matter jurisdiction and jurisdiction over the person of Mr. Patmon, the magistrate's orders of May 5 and 9, 1983 were void and a nullity because they were issued in excess of and without the parameters of Judge Boyle's order of reference of April 20, 1983, without supervision of an Article III judge and without review by an Article III judge. TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972); United States v. Saunders, 641

F.2d 659 (9th Cir. 1980); Wingo v. Wedding, 418 U.S. 539 (1974). See also, Fischer v. Marubeni Cotton Corp., 526 F.2d 1338 (10th Cir. 1975); Srybnik v. Epstein, 13 F.R.D. 248, 249 (S.D. N.Y. 1952); United States v. International Business Machines Corp., 71 F.R.D. 88 (D.C. N.Y. 1976).

Any such purported designation of Magistrate Carlson as an adjunct Article III judge to act without an order of reference or supervision or review by an Article III judge to handle inherently judicial tasks of Article III judges (i.e., PYK's and Mr. Patmon's motions for protective order, to quash, to dismiss and for stay), was unlawful and clearly in excess of the district court's power, authority and jurisdiction. See United States v. Saunders, supra; TPO, Inc. v. McMillen, supra.

The district court relinquished all decisional responsibility for the cases below prior to 10:55 a.m. on April 20, 1983. On May 13, 1983, the chief judge of the district court declined to assume responsibility for these cases. Since no other judge has been assigned these cases, they have been and are now without the supervision of an Article III judge.

CONCLUSION

The Sixth Circuit's decision in these and the related cases involved important and first impression questions of federal law (i.e., the appealability of an order granting discovery in aid of execution; the right of an individual to assert a fifth amendment protection to his own tax records and private papers in his possession;[2/] and the right of an individual to assert his fourth amendment protection against unreasonable searches and seizures of his private papers to an IRS administrative

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2/ The Sixth Circuit's decision squarely conflicts with Matter of Grand Jury Empaneled March 19, 1980, 650 F.2d 327 (3rd Cir. 1982), cert. granted, 51 U.S.L.W. 3789 (U.S. May 2, 1983; the Eighth Circuit in United States v. Harrison, 654 F.2d 359, 361 (8th Cir. 1981) [81-2 USTC ¶ 9558], and the Seventh Circuit in U. S. v. Peters, ___ F.2d ___ (7th Cir. 1983) [82-2 USTC ¶ 9457].

summons)3/ which should be settled by this Court. U. S. v. Janis, 428 U.S. 433, 439 (1976); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976); Parker v. Flook, 437 U.S. 584 (1978).

The questions presented are important to the administration of the federal tax laws, of which settlement by this Court would be in the public interest, since Petitioners' cases are representative of a problem confronting many taxpayers. Detroit Edison Co. v. N.L.R.B., 440 U.S. 301 (1979).

3/ The Sixth Circuit's decision conflicts with U. S. v. Beacon Federal Savings & Loan, ____ F.2d ____ (2nd Cir. 1983) [83-2 USTC ¶ 9611].

Disparate enforcement of the Internal Revenue laws resulting solely from a fortuity of forum or circuit can be prevented only through the resolution by this Court of the questions presented in this petition. Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 404 (1976).

Since there now exist a clear and express conflict of decisions among the circuits on important questions of federal law affecting many people in different parts of this Country, compelling reasons are evident why the questions presented here should be reviewed and definitively determined by this Court.

The Sixth Circuit denied the Petitioners their statutory rights to

appeal final orders and by erroneously concluding that the appeals were "non-appealable", encroached upon the constitutional, statutory and civil liberties of the Petitioners. The implications of this decision are serious and far-reaching. It essentially destroys for all intents and purposes, any sense of comfort in well-established statutory and judicial precedent. Accordingly, this court should correct the erroneous refusal of the Sixth Circuit to assume jurisdiction of the appeals by granting the petition for a writ of certiorari.

This court may wish to consolidate these cases with case Nos. 81-1189/1251/ 1318/1549/1804 and 82-1005/ 1006/1217.

Respectfully submitted,

PATMON, YOUNG & KIRK
PROFESSIONAL CORPORATION

Harrison H. Young
Frederick A. Patmon
In propria persona
3770 Penobscot Building
Detroit, Michigan 48226
(313) 965-2675

APPENDIX

A P P E N D I X

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 81-1189, 81-1190, 81-1251, 81-1318
81-1549, 81-1804, 82-1005, 82-1006,
82-1217, 82-1827, 83-1337, 83-1338

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and BONNIE BURKS, Revenue Agent of the Internal Revenue Service,

Petitioner-Appellees ORDER

v.

PATMON, YOUNG AND KIRK, (81-1189, 81-1318, 81-1549, 81-1804, 82-1005, 82-1006, 82-1217, 83-1337, 83-1338); PATMON AND KIRK, (82-1217, 82-1827,); HALLISON H. YOUNG, (81-1190, 81-1549, 81-1804, 82-1005), individually and in his capacity as an officer and responsible employeee of Patmon, Young and Kirk, (81-1251); and FREDERICK PATMON, (82-1827, 83-1338);

Respondents-Appellants

/

Before: MARTIN, CONTIE, and KRUPANSKY, Circuit Judges.

We have before us a group of appeals growing out of an investigation by the Internal Revenue Service of Hallison Young

and his Detroit law firm.

On October 31, 1980, the IRS issued a summons to Patmon, Young and Kirk requesting documents and records for the tax years 1976 and 1977. Patmon, Young and Kirk delivered some of the requested documents but claimed that the remaining documents either never existed or were lost in a recent corporate relocation. Because the IRS was unsatisfied with this response, it petitioned the district court to enforce the summons. After hearing, the district court issued an enforcement order.

On June 17, 1981, the IRS moved the district court to hold Patmon, Young and Kirk in contempt because the corporation failed to produce all of the requested documents as ordered by the court. The district court held a second hearing at the close of which the court held the

corporation and Mr. Young in contempt. The court ordered Mr. Young incarcerated until he purged himself of the contempt. The order also fined Patmon, Young and Kirk $500.00 per day until it purged itself.

Attempting to purge himself of the contempt, Young appeared before the district court in August, 1981. The court, finding that Young and the firm had failed to purge themselves, imposed sanctions. These twelve appeals followed, none of which we now hold, on the basis of United States v. Schlansky, No. 82-5200 (June 16, 1983), and United States v. Rylander, U.S. _____, 51 U.S.L.W. 4367 (April 19, 1983), has merit.

Disposition of each appeal is as follows:

No. 81-1189 : enforcement of summons affirmed.

No. 81-1190 : enforcement of summons dismissed.

No. 81-1251	:	enforcement of summons affirmed.
No. 81-1318	:	order directing appearance before IRS affirmed.
No. 81-1549	:	order finding contempt and imposing sanctions affirmed.
No. 81-1804	:	order denying motion to find contempt purged and imposing sanctions affirmed.
No. 82-1005	:	order denying various motions, enforcing previous order, and authorizing an additional thirty days to purge affirmed.
No. 82-1006	:	enforcement of summons affirmed.
No. 82-1217	:	enforcement of summons affirmed.
No. 82-1827	:	the record is incomplete; jurisdiction is retained pending the parties' submission of record and briefs. Appealability of the order is questionable.
Nos. 83-1337 83-1338	:	dismissed as nonappealable.

It is so ordered

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

* This order was prepared by Judge Martin.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

HON. Patricia J. Boyle
Civil Action No. 80-74872

-vs-

PATMON, YOUNG & KIRK, P.C.,

Respondent.

_____/

ORDER DIRECTING RESPONDENT TO PAY COSTS AND APPEAR AT DEBTOR'S EXAMINATION AND ORDER OF REFERENCE

This court ordered respondent to appear and show cause why it should not be held in civil contempt and subjected to imposition of more severe sanctions for failure to pay a contempt sanction ordered by the court on December 9, 1981, and for failure to appear for debtor's examination. Respondent appeared on August 27, 1982.

In response to the failure to pay the Eight Thousand and 00/100 Dollar ($8,000.00) sanction, respondent's papers

and oral argument claim (1) that the matter is pending on appeal and there is therefore no wilful violation of the court's order, (2) that the sanction has been treated as a money judgment and that contempt is not available to enforce such a judgment under 28 U.S.C. § 2007, (3) that respondent filed a document in December, 1981, entitled "Response to Order Assessing Fine Against Corporate Respondent" which stated that the corporation "does not have the present ability (sufficient funds) to pay the fine imposed against it."

In defense of respondent's failure to appear for depositions, respondent claimed (1) that the second deposition was adjourned and that a motion for stay had been made as to the first and (2) that there is not an explicit order of the court directing respondent to appear for examination. The matter was taken under advisement given the pendency of the appeal, although the court

did not then and does not now hold as a matter of law that the appeal, as to which a stay was denied, excused respondent's failure to pay or to appear. Nor can respondent's statement that is does not have assets to pay defeat petitioner's right to determine this question by proceedings supplementary to judgment.

Moreover, the court does not accept respondent's claim unsupported by the record or by affidavit of the secretary who allegedly adjourned the appearance that the second deposition was adjourned without date or that Fed. R. Civ. P. 69(a) precludes a debtor's examination before execution on the judgment. The rule specifically provides that "in aid of a judgment or execution" the judgment creditor may obtain discovery from any person, including the judgment debtor, in the manner provided by the Federal Rules or by state practice and discovery devices are

available under the Federal Rules and respondent has submitted no authority that discovery of respondent would be unavailable in state court prior to execution. Moreover, the sanctions which are available under the Federal Discovery rules are also applicable in post-judgment proceedings.*

WHEREFORE IT IS ORDERED that within seventy-two (72) hours respondent shall appear before Magistrate Thomas A. Carlson for the taking of deposition through one or more persons designated pursuant to Fed. R. Civ. P. 30(b)(6), concerning all matters relevant to the identity and location of

---

* Respondent's procedural objection that the matter should have been brought on as a motion to compel has been considered and rejected by the court, it being the court's opinion that respondent had adequate notice and opportunity to meet petitioner's claim.

the assets of respondent. Respondent will also pay to petitioner the costs of the reporter for two scheduled depositions and the reasonable costs of bringing the instant order to show cause to be submitted by petitioner. These costs are to be paid within twenty-four (24) hours of petitioner's submissions.

The petitioner's request for referral pursuant to Appendix A of the Local Rules is denied without prejudice and the Petitioner's request for immediate payment of the interim sanction of Eight Thousand and 00/100 Dollars ($8,000.00) previously imposed as well as more coercive sanctions such as the appointment of a receiver is referred to the magistrate for report and recommendation.

Should respondent fail to appear as ordered and to make full disclosure as directed, the magistrate is ordered to consider the propriety of the appointment

of a receiver for the Professional Corporation, as a first priority, it being the opinion of this court that respondent's recalcitrance must be corrected and that if full disclosure is not made, appointment of a receiver is a viable alternative method of enforcement of the orders of this court.

IT IS SO ORDERED.

Date: 20 Apr 1983
Detroit, Michigan

/S
PATRICIA J. BOYLE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

-vs-

PATMON, YOUNG & KIRK, P.C.,

Respondent.

CIVIL ACTION
NO. 80-74872

/

O R D E R

Former United States District Judge Patricia J. Boyle having ordered that Respondent Professional Corporation appear, through one or more designated persons, before the undersigned for inquiry into all matters relevant to the identification and location of the assets of Respondent (Judgment Debtor), Respondent having filed, on May 3, 1983, a Motion to Quash the Deposition Subpoena Duces Tecum, Objections

to the Deposition Notice, and a Request for Immediate Consideration thereof, a Motion for Protective Order, and a Motion for Relief from Ex Parte Order Enlarging Time for Debtor's Examination, all of Judge Boyle's Motions having been referred to the undersigned, the parties having appeared through counsel on May 4, 1983, and the Court being fully advised in the premises;

Now, therefore, IT IS ORDERED that Respondent's Motion for Immediate Consideration be, and the same hereby is, GRANTED;

IT IS FURTHER ORDERED that Respondent's Motion to Quash the Deposition Subpoena Duces Tecum and its Motion for a Protective Order be, and the same hereby are, DENIED;

IT IS FURTHER ORDERED that Respondent's Motion for Relief From Ex Parte Order be, and the same hereby is, DENIED AS MOOT, in light of the decision by

Judge Pratt (who issued the Ex Parte Order) to deny relief on May 4, 1983;

The undersigned additionally finding that the witness who was designated and who appeared for examination before the Court on May 4, 1983, Mr. Wainwright, was not sufficiently informed to comply with the inquiry ordered by Judge Boyle, and that it is necessary to obtain the testimony of someone who is familiar with the current nature and extent of Respondent's law business;

Now, therefore, IT IS FURTHER ORDERED that Mr. Frederick Patmon, of Respondent P.C., appear before the undersigned on Monday, May 9, 1983, at 2:00 p.m., 1026 U.S. Courthouse in Detroit, Michigan, to testify as to the identity and location of Respondent's assets; IT IS FURTHER ORDERED that Mr. Patmon bring with him those documents which he, the Respondent firm, or any employee or agent thereof, presently

possesses, or has the right of possession, concerning the assets of Respondent, including the "General Ledger" thereof, and as more specifically identified in Petitioner's Deposition Subpoena dated April 22, 1983.

Respondent's Second Notice to designate Mr. Doshi, an accountant who has already testified, to answer for the firm is hereby quashed.

/S

THOMAS A. CARLSON
UNITED STATES MAGISTRATE

DATED: May 5, 1983

cc: Hallison H. Young, Esq.
Mark R. Werder, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

Civil Action No. 80-74872

-vs-

PATMON, YOUNG & KIRK, P.C.,

Respondent.

ORDER

The undersigned having ordered on May 5, 1983 that Mr. Frederick Patmon, of Respondent P.C., appear before the Court on May 9, 1983 to testify as to the identity and location of the assets of Respondent (Judgment Debtor) corporation, Mr. Patmon having failed to appear as scheduled, and Respondent's counsel having advised the Court that numerous appeals have been filed, both in this Court and the U.S. Court of

Appeals for the Sixth Circuit, seeking relief from the obligation to appear for debtor's examination;

Now, therefore, IT IS ORDERED that Mr. Frederick Patmon appear, as previously ordered, or Friday, May 13, 1983, at 2:00 p.m., before the undersigned, 1026 U.S. Courthouse, Detroit, Michigan. This re-scheduling if for the express purpose of allowing Respondent time to obtain a stay of the proceedings before the undersigned; if respondent fails to obtain such a stay, however, and Mr. Patmon fails to appear on May 13, 1983, the parties are hereby advised that the undersigned, on that day, will recommend that Respondent be held in contempt for failure to obey the orders of the Court and further, that a bench warrant issue to obtain the presence of Mr. Patmon.

Dated: May 9, 1983

/s/

THOMAS A. CARLSON
UNITED STATES MAGISTRATE

APPENDIX E

Nos. 83-1337 and 83-1338

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and
BONNIE BURKS, Revenue Agent of the
Internal Revenue Service,

Petitioners-Appellees

v. O R D E R

PATMON, YOUNG AND KIRK, (83-1337,
83-1338); and Frederick Patmon,
(83-1338);

Respondents-Appellants

Before: MARTIN, CONTIE, and KRUPANSKY,
Circuit Judges.

Upon consideration of the petition for rehearing filed herein by appellants, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the peti-

tion for rehearing be and it hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Appendix F

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-1337 and 83-1338

UNITED STATES OF AMERICA AND BONNIE BURKS, REVENUE AGENT OF THE I.R.S.,	:	ORDER
Petitioners-Appellees,	:	
vs	:	
PATMON, YOUNG, AND KIRK,	:	
Respondents-Appellants.	:	

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme

Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE
COURT
JOHN P. HEHMAN, CLERK

/s/ John P. Hehman

APPENDIX G

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202

May 25, 1983

LEONARD GREEN
CHIEF DEPUTY CLERK

TELEPHONE
(513) 684-2953
FTS 684-2953

Mr. Ulyssis W. Boykin, III
Mr. Stanley Kirk
Mr. James F. Miller
Mr. Michael L. Paup
Mr. Charles E. Brookhart
Mr. Glenn L. Archer
Mr. Leonard R. Gilman

Re: United States of America, et al. vs. Hallison H. Young, et al.
Nos. 81-1189, 81-1190, 81-1251, 81-1318, 81-1549, 81-1804, and 82-1005

United States of America, et al. vs. Patmon, Young and Kirk
Nos. 82-1006, 82-1217

United States of America, et al. vs. Patmon, Young and Kirk and Frederick A. Patmon
Nos. 83-1337, 83-1338

Dear Counsel:

This letter will supplement my letter to you of May 4, 1983, in which you were instructed to file supplemental briefs in light of the Supreme Court's decision in United States vs. Rylander, 51 U.S.L.W. 4367 (April 19, 1983). Those briefs are to be filed by June 6, 1983.

We have recently received notices of appeal from two more district court rulings in district court case No. 80-74872, United States of America, et al, vs. Patmon, Young and Kirk, et al. Those appeals, filed by Patmon, Young and Kirk and Frederick A. Patmon, have been docketed in this court as Nos. 83-1337 and 83-1338, respectively.

I have been asked by the court to advise you that all of these cases will be heard in Cincinnati on June 21, 1983, Specifically:

. Cases Nos. 81-1189, 81-1190, 81-

1251, 81-1318, and 81-1549, which were argued on May 28, 1982, will be reargued with the original briefs being augmented by the supplemental brief called for earlier;

Cases Nos. 82-1006 and 82-1217 will be argued on the basis of the earlier filed briefs and the supplemental brief;

Cases Nos. 83-1337 and 82-1338, and any other new appeals which might be filed from recent district court or magistrate actions in these matters, will be argued on the basis of either the supplemental brief referred to above or an additional short brief, and any appendix necessary for the court's consideration.

It is the intention of the court to have presented to it on this occasion all pending matters raised in all of the appeals stemming from this litigation. The court will entertain no motions to postpone the hearing date.

Very truly yours,
/s/
Leonard Green
Chief Duputy Clerk

LG/jj

Appendix H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

-vs-

PATMON, YOUNG & KIRK, P.C.,

Respondent.

Civil Action No. 80-74872

Honorable Patricia J. Boyle

ORDER TO SHOW CAUSE WHY RESPONDENT SHOULD NOT BE HELD IN CIVIL CONTEMPT

Petitioner United States of America having moved this court for an order directing respondent Patmon, Young & Kirk, P.C., to show cause why it should not be held in civil contempt and subjected to imposition of more severe sanctions and respondent not having answered said petition and it appearing from the petitioner's that the respondent has failed to pay a sanction ordered by the

court on December 9, 1981, that respondent has on two occasions failed to appear for debtors examination and failed to seek or obtain a protective order and it appearing that there is reason to believe that respondent is in contempt of the orders of this court,

IT IS HEREBY ORDERED that respondent show cause on August 27, 1983 at 2:00 p.m. why respondent should not appear by a responsible person and submit to a debtor's examination and why respondent should not tender the amount of the sanction imposed herein. The Government's request for disciplinary referral is DENIED.

SO ORDERED.

Date: Aug 13 1982
Detroit, Michigan

/s/
PATRICIA J. BOYLE
United States District Judge

Appendix I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ADMINISTRATIVE ORDER

The Honorable Patricia J. Boyle having resigned from the Bench of this Court:

IT IS HEREBY ORDERED that all motions filed and pending on the civil docket of former Judge Patricia J. Boyle are referred to Magistrate Thomas A. Carlson for disposition and/or report and recommendation in accordance with 28 U.S.C. § 636 and Local Rule C-1.

/s/ John Feikens
John Feikens
Chief United States District Judge

Dated: April 20, 1983

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,

Petitioners,

v.

PATMON, YOUNG, & KIRK, P.C.,

Respondent.

(Chief United States District Judge John Feikens)

Civil Action No. 80-74872

NOTICE OF APPEAL

Notice is hereby given that Respondent Patmon, Young & Kirk Professional Corporation hereby appeals to the United States Court of Appeals Sixth Circuit from an Order Directing Respondent to Pay Costs and Appear at Debtor's Examination and Order of Reference entered April 20, 1983, Ex parte Order Enlarging Time for Debtor's Examination entered April 22, 1983, and Order entered May 5, 1983, copies of which are attached

hereto.

Dated: May 6, 1983

PATMON AND YOUNG
PROFESSIONAL CORPORATION
By /s/
Hallison H. Young (P22642)
Attorneys for Respondent
3770 Penobscot Building
Detroit, Michigan 48226
(313) 965-2675

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,

Petitioners,

v.

PATMON, YOUNG, & KIRK, P.C.,

Respondent.

(Chief United States District Judge John Feikens)

Civil Action No. 80-74872

NOTICE OF APPEAL

Notice is hereby given that deponent Frederick A. Patmon hereby appeals to the United States Court of Appeals Sixth Circuit from an Order entered by Magistrate Thomas A. Carlson, United States District Court Eastern District of Michigan, Southern Division, on May 5, 1983, copy of which is attached hereto.

Dated: May 6, 1983

/s/
Frederick A. Patmon
P 18695

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No. 83-824

In the Supreme Court of the United States

OCTOBER TERM, 1983

PATMON, YOUNG AND KIRK PROFESSIONAL CORPORATION AND FREDERICK PATMON, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners challenge the court of appeals' holding that it lacked jurisdiction of their interlocutory appeals from a district court order directing them to appear before a magistrate for the conduct of a debtor's examination under Fed. R. Civ. P. 69(a).

1. Petitioner Patmon, Young and Kirk is a professional corporation engaged in the practice of law. In aid of an investigation of the tax liabilities of Hallison Young, one of the corporation's principals, the IRS issued summonses, under authority of Section 7602 of the Internal Revenue Code (26 U.S.C.), for specified corporate financial records (Pet. App. 1a-2a). When the corporation refused to comply, the government petitioned for enforcement in the United States District Court for the Eastern District of Michigan

(*id.* at 5a). The district court ordered the summonses enforced, and the court of appeals denied a stay. The corporation nevertheless persisted in refusing to comply with the summonses, whereupon it was held in contempt (*id.* at 2a-3a). The corporation was fined $500 per day, or a total of $8,000, for its intransigence (*id.* at 3a, 5a).

The corporation refused to pay the fine (Pet. App. 5a). Pursuant to Fed. R. Civ. P. 69(a), the government sought discovery, in the form of testimony from the corporation's officers, as to the existence of assets from which the fine might be satisfied.[1] On April 20, 1983, the district court ordered the corporation to appear before a United States magistrate "for the taking of deposition[s] * * * concerning * * * the identity and location of [its] assets" (Pet. App. 8a-9a). The district court also referred to the magistrate, for report and recommendation, the government's requests for immediate payment of the $8,000 fine "as well as [for] more coercive sanctions such as the appointment of a receiver" (*id.* at 9a-10a).

The magistrate conducted a hearing and concluded that the witness furnished by the corporation "was not sufficiently informed to comply with the inquiry ordered" by the district court (Pet. App. 13a). On May 5, 1983, the magistrate ordered petitioner Patmon, the corporation's senior attorney, to appear and give testimony (*id.* at 13a-14a). Both Patmon and the corporation refused to appear before the magistrate (*id.* at 15a-17a). Instead, they filed a notice of appeal from the district court's April 20 order and the magistrate's May 5 order (*id.* at 28a-29a). The Sixth Circuit,

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[1] Rule 69(a) provides that, "[i]n aid of [a] judgment or execution [for the payment of money], the judgment creditor * * * may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held."

in an unpublished order, "dismissed [the appeals] as non-appealable" (*id.* at 4a).[2]

2. The court of appeals correctly dismissed petitioners' challenge to the discovery orders for lack of jurisdiction. The jurisdiction of the courts of appeals is generally limited to appeals from "final decisions of the district courts." 28 U.S.C. 1291.[3] The district court's April 20 order, insofar as it instructed the corporation to appear before a magistrate "for the taking of depositions" (Pet. App. 8a), was an interlocutory order directing discovery, and the law is well established that such orders are not independently appealable "final decisions," but can be challenged only after a decision on the merits or by way of a contempt citation for refusal to comply. *E.g., Rouse Construction International, Inc.* v. *Rouse Construction Corp.*, 680 F.2d 743 (11th Cir. 1982); *Childs* v. *Kaplan*, 467 F.2d 628 (8th Cir. 1972); *United States* v. *Fabric Garment Co.*, 383 F.2d 984 (2d Cir. 1967).[4] The district court's April 20 order, insofar as it referred the question of additional sanctions to the magistrate "for

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[2]The Sixth Circuit simultaneously disposed of 10 other appeals, filed by the corporation and by Hallison Young, seeking review of the district court's orders directing enforcement of the summonses, holding them in contempt, and imposing sanctions (Pet. App. 1a-4a). The corporation and Young have filed a separate petition for a writ of certiorari challenging the decision below insofar as it affirmed the district court in those respects. *Patmon, Young and Kirk Professional Corporation and Hallison H. Young* v. *United States*, No. 83-975.

[3]Petitioners' contention that their appeals could be sustained on the theory of "pendent and retained jurisdiction" (Pet. 25, 29; emphasis omitted) or under exceptions to the finality doctrine (*id.* at 30) was not raised below and must be deemed waived.

[4]Contrary to petitioners' contention (Pet. 28), the Fifth Circuit's per curiam decision in *First Federal Savings & Loan Ass'n* v. *Fisher*, 544 F.2d 902 (1977), is not in conflict with these holdings. The parties there did not address the jurisdictional issue, and the Fifth Circuit simply assumed that it had jurisdiction "[f]or the purposes of [that] case" (544 F.2d at 902 n.2).

report and recommendation" (Pet. App. 9a), was likewise interlocutory and plainly did not constitute a "final decision" within the meaning of Section 1291. And the May 5 order of the United States magistrate directing petitioner Patmon to appear for depositions, besides not being "final," was not even a "decision of a district court" for purposes of appeal under that Section. *Horton* v. *State Street Bank & Trust Co.*, 590 F.2d 403, 404 (1st Cir. 1979); *United States* v. *First National Bank*, 576 F.2d 852, 854 (10th Cir. 1978); *McCall* v. *Cudd*, 544 F.2d 934 (8th Cir. 1976).[5]

3. Petitioner Patmon contends (Pet. 32-37) that the orders entered below "are unlawful and void" as to him because the district court lacked jurisdiction of his person. Patmon, however, did not appeal from the district court's April 20 order — indeed, that order did not even apply to him — and he thus has no standing to challenge it. Patmon did appeal from the magistrate's May 5 order instructing him to appear for depositions, but, as we have pointed out above, that order was not appealable and his appeal was thus properly dismissed. Patmon has twice been directed by the magistrate to appear and give testimony, directions he has twice ignored. If he wishes to contest the magistrate's jurisdiction, his remedy is to take his claim to the district court, which has authority to accept, modify or reject the magistrate's recommendations. Until then, Patmon has suffered no injury and there is nothing for the court of appeals (or this Court) to review.

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[5]Petitioners premise their jurisdictional arguments in part on the incorrect assertion that the orders in question "impos[ed] coercive sanctions" against them (Pet. 25-26). The orders here in question were issued solely in aid of discovery under Fed. R. Civ. P. 69(a). The orders imposing sanctions, which were separately appealed and which were affirmed by the Sixth Circuit, are the subject of a separate petition for a writ of certiorari. See page 3 note 2, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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